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Everything You Wanted to Know About Appellate Filings But Were Afraid to Ask

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What is an appeal?

For our purposes, know these two things: First, the Court of Appeals only has jurisdiction if a statute says that it has jurisdiction. If any requirements are not met, it has no jurisdiction. It has no discretion to enlarge or diminish its jurisdiction. Second, if the Court of Appeals has jurisdiction, it must render a decision on the case. As you will see, this is different from special actions.

What is a special action?

Under the common law, there were several kinds of extraordinary writs, including the writs of mandamus, prohibition, and certiorari. In the late 1960s, Arizona established the Rules of Procedure for Special Actions to set forth clear rules to govern these writs. These rules can be used to seek relief against many government officials. We use these rules to seek relief when a trial court makes an incorrect ruling before trial. Other jurisdictions commonly call this an interlocutory appeal. The main thing for us to know is that a special action is a way to appeal a judge's decision before trial.

The differences between appeals and special actions.

Not everything is appealable. By that, I mean that we do not have a right to appeal everything. The State's right to appeal is strictly limited to constitutional or statutory provisions that clearly grant that right. *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 340, 767 P.2d 226, 227 (App. 1989), citing *State v. Lelevier*, 116 Ariz. 37, 567 P.2d 783 (1977).

Our appeals statute is A.R.S. § 13-4032:

An appeal may be taken by the state from:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.

4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.
5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.
6. An order granting a motion to suppress the use of evidence.
7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

What you need to remember: if it isn't in the statute, then we can't appeal it. So you should think about a special action instead.

Some important notes about Section 13-4032.

1. Dismissal: The State may appeal a dismissal with prejudice when it asked for dismissal without prejudice. *State v. Gilbert*, 172 Ariz. 402, 404-05, 837 P.2d 1137, 1139-40 (App. 1991).
2. Order granting a new trial: The State's appeal stays the new trial. *See* Ariz. R. Crim. P. 31.16.
3. Cross-appeal: This provision is not as big as it looks. It only grants a right to appeal if we win at trial and then the defendant appeals. Then, the appeals court is only likely to address your issue if they reverse the conviction and remand. Otherwise, they have no need to address it because you already won at trial and it their decision would have no practical effect.
4. Victim's rights: We have used this to appeal adverse rulings about restitution, but the provision covers other circumstances as well.
5. Illegal sentence: An illegal sentence is one that is outside of statutory guidelines, not simply one that is legally incorrect. Confused? Better research each specific situation.
6. Suppression vs. preclusion: In *State v. Bejarano*, 219 Ariz. 518, 200 P.3d 1015 (App. 2008), the trial court precluded a witness because of a purported Rule 15 violation. The State appealed. The Court of Appeals addressed the issue of jurisdiction and clarified the difference between suppression and preclusion. Suppression, as used in 13-4032, is when a court excludes evidence because it was unconstitutionally or illegally obtained. The State may appeal suppression. Preclusion, on the other hand, is when a court excludes evidence for some other reason. Some examples may include exclusion under Rule 15.7 or the Rules of

Evidence. The State has no right to appeal preclusion and should instead attempt a special action.

7. Acquittal after guilty verdict: Please note that this only applies if the trier of fact convicts and the trial court then grants a Rule 20 motion. If you get Rule 20ed before the case goes to the jury, there is no appeal. In that case, jeopardy has attached and terminated.

Now let's talk about special actions. They are:

- extraordinary relief and highly discretionary. *McKaney v. Foreman*, 209 Ariz. 268, 275, ¶ 35, 100 P.3d 18, 25 (2004).
- appropriate where there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Sp. Act. 1(a); *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 121, 945 P.2d 1251, 1252 (1997).
- appropriate "in cases involving a matter of first impression, statewide significance, or pure questions of law." *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 270-71, ¶ 9, 159 P.3d 578, 580-81 (App. 2007) (citations omitted).

The appellate court does not have to hear your special action. It might decline jurisdiction for several reasons:

- you lose on the merits
- your issue isn't important enough
- you have a remedy on appeal
- you waited too long to file
- etc.

What about the timing of a special actions?

There is no time limit for filing a special action; the only restriction is laches. *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283, 787 P.2d 1077, 1079 (App. 1989). But the State may not resurrect an issue that should have been appealed by filing a special action after the time for a notice of appeal has lapsed. *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 796 P.2d 876 (1990)

A note about asymmetry and the State's and defense's likelihood of getting special action review: Because the State's right to appeal is much more limited than defendants', it is easier for the State to get special action jurisdiction granted.

What is a Rule 32 proceeding?

Rule 32 governs post-conviction relief proceedings. In these proceedings, a defendant may raise issues that can't be raised on appeal, like ineffective assistance of counsel, new evidence, and actual innocence. Rule 32.1 gives the list of grounds that can be raised. These proceedings are filed and litigated in the trial court, but they may also be appealed to higher courts.

When to appeal

For Superior Court cases, we must file a notice of appeal “within 20 days after the entry of judgment and sentence,” or, in a cross-appeal, “within 20 days after service of the appellant's notice of appeal.” Ariz. R. Crim. P. 31.3. In Justice Court, we must file your notice of appeal “within 14 calendar days after the entry of the order, ruling, judgment, or sentence appealed from.” Ariz. Super. Ct. R. App. P. – Criminal 4(a). A motion for reconsideration does not extend the time for the notice. If our notice of appeal is late, the Court of Appeals has no jurisdiction to hear our appeal. *See State v. Limon*, 229 Ariz. 22, 23, ¶¶ 4-6, 270 P.3d 849, 850 (App. 2011).

TIP: Do you think a motion for reconsideration may work, but worry whether the court will rule in time for you to file a notice of appeal? Try this: In Superior Court, file your motion but still file a notice of appeal within your 20 days. Then ask the Court of Appeals to revest jurisdiction in the trial court so it can decide the motion for reconsideration. In Justice Court, file your motion but still file a notice of appeal within your 14 days. Unlike in felony appeals, filing the notice of appeal does not divest the Justice Court of jurisdiction, so it can consider the motion. The Justice Court is divested of jurisdiction once the appeal is perfected, meaning when the appellate memoranda are filed.

How to appeal

File a notice of appeal. If the case is still pending (e.g., the judge suppressed evidence but the case is still alive), you should file a motion to dismiss for purposes of appeal, citing *State v. Million*, 120 Ariz. 10, 12-15, 583 P.2d 897, 899-902 (1978). This avoids leaving the defendant, and the case, in trial-court limbo during the appeal and guards against speedy trial claims later.

What next?

After we file our notice of appeal, we must file a designation of transcripts within 5 days of the notice. In that designation, we list the transcripts that need to be prepared and who the court reporter is for each transcript. Look at Rule 31.8(b)(4)

for details. We file it in Superior Court and send copies to the reporters. From there, the reporters will file the transcripts with the Court of Appeals.

Then what?

When the record is complete, the Court of Appeals will send us an order telling us when our opening brief is due (40 days from the day of that order). Ariz. R. Crim. P. 31.13(a). The appellee will have 40 days to respond, and we will have 20 days to reply. After the briefing is finished, the appeal will be “at issue” and you can start waiting. You can expect to wait for at least a month, usually more, after the briefing is done. In a semi-random sample of 10 of our appeals, the Court ruled, on average, 2.2 months after the briefing was done.

TIP: for cases involving victims, advise them up front about how long appeals take. Explain the process so they understand why it takes so long.

What’s in a brief?

Rule 31.13(c) details the contents of a brief. You need a table of contents, a table of citations, a statement of the case, a statement of facts, a statement of the issues presented, the argument, and a short conclusion stating the precise relief sought. You can also include an appendix, if desired. If you include an appendix, and e-file it, the documents in it must be electronically bookmarked in the appendix’s table of contents.

How to file a special action

Rule 7(e) of the Special Action Rules explains what must be filed in an appellate court. First, a petition with a jurisdictional statement, a statement of the issues, a statement of the facts, and the argument. Next, a copy of the decision from which the petition is being taken must be attached to the petition. The trial court does not send up the record in a special action, so the appellate court only has what you provide it. That means that if you are the petitioner, you must file an appendix containing all of the relevant portions of the record.

Do you need a stay?

Has the trial court set a deadline that you need stayed, or is trial coming up and you need time to litigate your special action? Rule 5 of the Special Action Rules governs stays. Just remember to ask the trial court for a stay first – they might grant it, and the appellate court is not going to want to get involved if you haven’t asked the trial court first.

Rule 32 review

Under Rule 32.9(c), if we lose a Rule 32 proceeding, we may file a petition for review within 30 days of the decision. Rule 32.9 sets the requirements for the petition.

After the decision

You get the decision. You win (congratulations!) or you lose (I'm sorry). The next step is a petition for review. Our supreme court is not a court of error. It exists, for the most part, to declare the law. It does not exist to fix every error that may still exist in a case after the Court of Appeals is done. Because of that, a petition for review must explain persuasively why the court should hear the case.

Rule 31.19(c)(3) of the Arizona Rules of Criminal Procedure explains why petitions may be granted:

the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

In other words, if we want to petition for review, we have a difficult job. We look back at those same factors we considered in deciding to appeal.

If we decide to file a petition for review, we have 30 days to do so. Your petition is your chance to explain to the court why the issue in your case is important enough for it to hear. It is not necessarily about the merits of the case, but about the importance of the issue presented. See Rule 31.19 for details. The appellee will have 30 days to respond. Then, we wait again. Our supreme court takes a couple of months to decide whether to take review of a case. If it accepts review, it will set a time for briefing on the merits and oral argument. If the court declines review, a mandate will issue from the Court of Appeals, sending your case back to the trial court.

	Appeal	Special action	Rule 32
What it can raise	Any appealable issue (13-4032)	Issues with no adequate remedy on appeal	Issues specified in Rule 32.1
Where it is filed	Next court up (Court of Appeals for felonies, Superior Court for misdemeanors)	Next court up (Court of Appeals for felonies, Superior Court for misdemeanors)	Trial court
Review	Petition for review to Supreme Court or special action to Court of Appeals	Petition for review to Supreme Court or appeal to Court of Appeals	Petition for review to next court up

About e-filing:

Division Two has assembled a guide to inserting hyperlinks in briefs:

<http://www.apltwo.ct.state.az.us/e-filer/usingHyperlinks.pdf>

Select Court Rules about e-filing:

Ariz. R. Civ. App. P. 4.2:

Rule 4.2. Electronic Filing

(a) Generally. A party filing a document electronically must ensure that the filing complies with the provisions of this Rule, and that the document is complete and readable.

(b) Portal. An attorney or a party must properly register on an appellate court's electronic filing portal before electronically filing a document. The portal may require payment of a fee in conjunction with an electronic filing.

(c) Format. A document filed electronically that contains text, other than a scanned document image that is submitted under this Rule, must be in a text-searchable .pdf, .odt, or .docx format. A document may not exceed the size limits allowed by the portal, but it may be broken up into multiple documents to accommodate such a limit. A filer may scan and file a document that requires a notary if the scan contains the notary's signature and stamp or seal. A party may file an official record of a court or government body if the scanned copy contains the court or body's official stamp or seal of authenticity. A party may satisfy a court rule that requires the attachment of a document or exhibit by electronically attaching within the same submission either a scanned image or an electronic copy in an approved format.

(d) Bookmarks. A document filed electronically with the appellate clerk may include bookmarks, and appellate courts encourage their use. A bookmark is a linked reference to another page within the same document. A document reference that is incapable of bookmarking may be made accessible by a hyperlink.

(e) Hyperlinks. A document filed electronically with the appellate clerk may include hyperlinks, and appellate courts encourage their use. A hyperlink is an electronic link in a document to another document, or to a website. Material that is not in the official court record does not become part of the official record merely because it is made accessible by a hyperlink.

(f) Signature and Authorization.

(1) Signature. All electronic filings must be signed. A person may sign an electronically filed document by placing the symbol “/s/” on the signature line above the person's name. An electronic signature has the same force and effect as an ink signature on paper.

(2) Authorization. The appellate court will treat a filing that uses a person's registration information as a filing made or authorized by that person.

(3) Filings by Multiple Parties. A person electronically filing a document containing more than one signature--such as a stipulation--may sign on behalf of other parties only if the person has actual authority to do so. The person may indicate such authority either by attaching a scanned

document confirming that authority and containing the signatures of the other persons who have authority to consent for such parties; or, after obtaining a party's consent, by inserting “/s/ (name) with permission” as the electronic signature of any non-filing party.

(g) Time of Filing. An electronically filed document will be deemed filed on the date and time that it is received by the appellate clerk, as shown on an email notification from the portal or as displayed within the portal.

(h) Electronic Distribution by an Appellate Clerk. An appellate clerk may electronically distribute appellate court documents to a party's or person's attorney of record. An appellate clerk also may electronically distribute documents to a self-represented party that has filed a completed and signed Form 5, which provides that party's email address and the party's written consent to electronic distribution at that email address. Electronic distribution of documents by the appellate clerk is complete when the documents are transmitted by an appellate clerk to the email address provided to the appellate clerk.

Ariz. R. Civ. App. P. 13.1:

(a) Applicability. A party may file an appendix with the party's brief in the Arizona Supreme Court and in Division One of the Court of Appeals. A party's appendix in the Arizona Supreme Court or Division One must be filed by the same method--paper or electronic--as the party's brief. An electronically filed brief in Division Two of the Court of Appeals must include electronic links when citing to the record on appeal or to other items, and the brief must not include an appendix. A party may file an appendix in Division Two only if filing a paper brief.

....

(d) Appendix Filed Electronically. A party that files a brief electronically may file a separate appendix or may file a combined brief and appendix as a single document, with the appendix following the brief.

(1) Page Numbering. The pages in an appendix must be numbered sequentially. If a party files a combined brief and appendix, the first page of the appendix must include a number sequential to the last page of the brief. For a separately filed appendix, the numbers should start with the cover page of the appendix.

(2) Multiple Volumes. If a separate appendix is more than one volume, page numbering should restart for each volume and include an identifier that distinguishes each volume (e.g., APPV1-001, APPV2-001).

(3) Bookmarks and Hyperlinks. Each item in the appendix table of contents must include a bookmark or hyperlink to the item in the appendix. If feasible, a combined brief and appendix must contain bookmarks or hyperlinks to items in the appendix whenever these items are cited in the brief.

Ariz. R. P. Spec. Act. 7:

(e) The petition shall consist of a single document. It shall include a jurisdictional statement, a statement of the issues, a statement of the facts material to a consideration of the issues presented, and an argument containing the petitioners' contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and appropriate references to the record. A copy of the decision from which the petition is being taken shall be attached to the petition. All references to the record shall be supported by an appendix of documents in the record before the trial court that are necessary for a determination of the issues raised by the petition. The response to the petition shall, if necessary, be supported by an appendix of documents in the record before the trial court that are necessary for a determination of the issues raised by the petition which are not contained in the petitioner's appendix. If either party's appendix exceeds 15 pages in length, it shall be fastened together separately from the petition or response. Except by permission of the court, petitions and responses shall not exceed (i) 10,500 words if in proportionate typeface, or (ii) 30 pages if in monospace typeface, exclusive of the appendix and the copy of the decision from which the petition is being taken, or (iii) 36 pages if handwritten. The reply, if any, shall not exceed (i) 5,250 words if in proportionate typeface, or (ii) 15 pages if in monospaced typeface, or (iii) 18 pages if handwritten. **The petition, response and any reply must otherwise comply with Rule 4(b), ARCAP or Rules 31.12 or 31.13 of the Ariz. R. Crim. P.** The petition, response and any reply must each be accompanied by a certificate of compliance that states the petition's line spacing and states either that (i) the petition uses a proportionately spaced typeface, together with the typeface, point size, and word count, or (ii) the petition uses a monospaced typeface, together with the number of characters per inch, or (iii) the petition is handwritten, together with the number of pages. A party preparing this certificate may rely on the word count of the processing system used to prepare the petition.

....

(i) To the extent they are not inconsistent with these rules, the Arizona Rules of Civil Appellate Procedure shall apply to special actions.